

£MALAWI

@Amnesty International's recommendations for permanent protection of basic human rights following the pro-democracy vote

1) INTRODUCTION

Malawi's recent decision to move to a multi-party political system has begun a process of change which includes drafting a new or amended Constitution. This presents an important opportunity for ensuring that the very highest standards in human rights protection are enshrined in the Constitution. This document contains recommendations for human rights guarantees as Amnesty International's contribution to the current debate on constitutional change. These are based on Amnesty International's experience in campaigning against a long-standing pattern of human rights violations in Malawi since 1964 under the government of Life-President Dr Hastings Kamuzu Banda and the Malawi Congress Party. Many of these violations resulted from provisions in the current Constitution and laws. There must be no return to the human rights abuses of the past.

2) THE RECENT MOVE TO A MULTI-PARTY POLITICAL SYSTEM

A two-thirds majority vote for multi-party democracy in a referendum held on 14 June 1993 marked the end of the one-party state in Malawi. The referendum campaign and its result were declared generally fair by international observers, although it was recognized that there had been substantial intimidation by government supporters in the ruling Malawi Congress Party (MCP), the paramilitary Malawi Youth League and the police and security forces. Many opposition supporters were beaten, threatened, arrested and, in some cases, killed. Several returning exiles were arrested and detained illegally without charge.

Prior to the referendum a technical team from the United Nations' Department of Political Affairs recommended the repeal or suspension of laws which restricted freedom of opinion, expression and association. However, these recommendations were only superficially met by the Malawian authorities. Laws restricting freedom of expression continued to be applied, opposition meetings required police authorization which was often denied or delayed, and the arrest and harassment of multi-party supporters continued throughout the referendum campaign.

In accordance with the referendum result, on 29 June 1993 the Malawi Parliament, restricted to the ruling MCP for 29 years, repealed Section 4 of the Constitution to allow for opposition parties. The two main opposition parties are the Alliance for Democracy (AFORD) and the United Democratic Front (UDF). At the same time an amnesty bill was passed declaring an amnesty for all exiles. Under the amnesty, those returning exiles who had been arrested during the run-up to the referendum were released without charge. Sedition and other charges against other government opponents were withdrawn and all but three known political prisoners were released.

A National Consultative Council (NCC) and a National Executive Council (NEC) are to be set up to look at the Constitution and the electoral process, with representatives from the MCP and the Public Affairs Committee (PAC) - a grouping of pro-democracy religious and professional bodies, and members of AFORD and the UDF - and also the President's Committee on Dialogue (PCD), which contains leading government ministers. The PAC and the PCD are currently negotiating the form and jurisdiction of these two councils, which will constitute a sort of shadow parliament (in the case of the CNN) and shadow cabinet (the NEC). When the NCC and the NEC are set up, discussions on further changes to the Constitution will begin. It is not yet clear whether their task will be to draft an entirely new Constitution or whether they will alter the existing Constitution and recommend changes to specific laws. The opposition are advocating a new Constitution as the only long-term way to ensure democracy.

Requests for assistance from international legal experts on constitutional law, the electoral process and a Bill of Rights have been made by opposition groups and others in Malawi, such as the Malawi Law Society. The government has agreed to invite an expert United Nations team to advise it on constitutional and legal reform. The United Nations has produced a report on the electoral process and recently held a seminar on democratic transition in Lilongwe, Malawi's capital, to discuss constitutional and legal issues with the relevant parties. The date for the forthcoming general election has not yet been set.

3) AMNESTY INTERNATIONAL'S HUMAN RIGHTS CONCERNS

Increasing local and international pressure for human rights improvements led to a considerable reduction in human rights violations after the government agreed in late 1992 to a referendum on a one-party or multi-party system. However, the referendum campaign was conducted within the framework of laws which severely inhibited freedom of expression, prescribing harsh penalties for non-violent criticism of the government.

Until 1992 political dissent had been routinely suppressed by detention without trial under the Preservation of Public Security Regulations, which are still in force although not used in the past year or more. Since 1992 the law of sedition has been used instead to silence critics of the government. Under Section 50 of the Penal Code, "seditious intent" is

defined as an intention "to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government" or "to raise discontent or disaffection amongst the subjects of the President". Chakufwa Chihana, leader of AFORD, was convicted of sedition simply for calling for a multi-party system and was sentenced to two years' imprisonment with hard labour in December 1992. This was later reduced on appeal to nine months with hard labour. Adopted by Amnesty International as a prisoner of conscience, he was released on 12 June 1993 just before the referendum but too late to participate in it. Another law, Section 60 of the Penal Code provides for a maximum penalty of life imprisonment for anyone making a publication or broadcast "harmful to the interests or to the good name of Malawi". In October 1992 Harry Chiume, Chakufwa Chihana's lawyer, was charged under this law for giving interviews to the British Broadcasting Corporation (BBC), although the charge was later dropped.

There is still no guarantee of fair trial for political prisoners as the judiciary has not yet attained sufficient independence from the government. Until mid-1992 all criminal cases with any political element and all death penalty cases were heard in the so-called "traditional courts", set up by the Traditional Courts Act which created a parallel judicial system respecting none of the essential guarantees of fair trial. In these "traditional courts", procedural matters and rules of evidence are entirely at the discretion of the court. Furthermore, defendants have no right of legal representation. Those convicted in a "traditional court" may only appeal against a sentence if the Minister of Justice agrees and such an appeal may only be heard within the "traditional court" system. Cases carrying the death penalty continue to be heard exclusively in the "traditional courts".

Orton Chirwa, a former Minister of Justice, and his wife, Vera Chirwa, also a lawyer, were convicted and condemned to death by a "traditional court" after a blatantly unfair trial in 1983. Their sentence, though confirmed on appeal, was commuted in 1984 to life imprisonment by Life-President Banda following international appeals on the Chirwas' behalf. Both were adopted by Amnesty International as prisoners of conscience. Orton Chirwa died in prison in October 1992. Vera Chirwa was released in January 1993 after 11 years in prison. Prominent political cases involving pro-democracy activists were heard by ordinary courts in 1992 and early 1993, but these trials too were unfair and resulted in prisoners of conscience being imprisoned.

Torture and ill-treatment of political prisoners was also routine up to late 1992. During their imprisonment both Vera and Orton Chirwa were periodically kept in leg-irons. Neither of them received adequate medical attention and both at times suffered from malnutrition. There can be no doubt that harsh prison conditions contributed to Orton Chirwa's death. In the past, opposition activists have also been under threat of violence including extrajudicial execution from state and paramilitary forces. There are currently over 100 people on death row in Malawi after unfair trials by the "traditional courts".

During 1991 and 1992 the authorities released well over 100 long-term political detainees, including many long-term detainees and prisoners of conscience. Pro-democracy activists who were arrested in the referendum campaign have all been released with charges withdrawn. However, there are three political prisoners still held who have been held since the mid-1960's who are now in their 29th year of imprisonment. Nelson Mtambo, Sidney Songo and Ntwana Mlombwa were reportedly arrested in the aftermath of an armed rebellion in 1965 led by former Cabinet Minister Henry Chipembere. It is not known if they were ever charged with any offence. They are probably held under presidential detention orders, although the government has never admitted their imprisonment in public or indicated if it has any legal basis.

4) RECOMMENDATIONS FOR THE PROTECTION OF HUMAN RIGHTS

The introduction of human rights guarantees into the Malawi Constitution and the repeal of laws infringing basic human rights are essential as the first step to ensure that these rights will be upheld and that there will be no recurrence of the human rights violations of the past. A genuine and public commitment from the highest officials in the government, the judiciary, the security forces and custodial officials to uphold these guarantees is required. In addition, a strong independent legal profession, independent indigenous human rights monitoring groups and a free press are also vital. Human rights guarantees in the Constitution will provide the framework for the institutionalization of human rights safeguards.

Amnesty International is therefore recommending the following safeguards to be included in the new or revised Malawi Constitution in order that it is consistent with internationally recognized human rights standards. Amnesty International is also recommending the implementation of international standards governing law enforcement officials including the police, security service and prison service. As regards the Malawi Young Pioneers (MYP), a partly-paramilitary government-sponsored organization which has been responsible for many human rights abuses against government opponents, Amnesty International considers that it should be disbanded on account of its extensive involvement in human rights violations committed outside the framework of the law against government opponents.

Human rights guarantees in the Constitution should be based on relevant international and regional human rights standards, for example the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on Human and Peoples' Rights. Of these three key human rights instruments, Malawi has only ratified the African Charter. While some derogation from certain provisions guaranteeing civil and political rights is not absolutely prohibited by international standards in times of public emergency, there are some rights which are so fundamental that they may never be derogated from in

any circumstances, even in a state of public emergency. These non-derogable rights, enumerated in Article 4(2) of the ICCPR include the right to life, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment, and the right to freedom of thought, conscience and religion. The Malawi Constitution should not place any restrictions on fundamental rights which go beyond the restrictions permitted under international law.

4.1 The right to freedom of expression and association

Guarantees for the freedom of expression, opinion, religion, conscience and assembly and association should be included in the Constitution. These guarantees should accord with Articles 18-20 and 21-22 of the ICCPR. Such guarantees will necessitate the repeal of all legislation which has facilitated the imprisonment of peaceful critics of the government. This includes detention without trial, provisions of the Preservation of Public Security Act, and relevant sections (such as sections 50 *Seditious Intent* and 60 *Publication of false news likely to cause fear and alarm to the public*) of the Penal Code and of the Protected Flags, Emblems and Names Act.

4.2 The right to fair trial before an independent and impartial court

The right to a fair trial before an independent and impartial court, with full guarantees for the defence, and with the right of appeal to a higher court against conviction and sentence, should be included in the Constitution. These rights should incorporate all the guarantees recognised by the ICCPR (articles 9.2-4, 14 and 15.)

All aspects of the Traditional Courts Act which conflict with the right to a fair trial should be repealed and the jurisdiction of capital cases returned to the normal courts. All those imprisoned through the Traditional Courts should have their cases reviewed by an impartial and independent tribunal.

All courts should meet international standards of independence, impartiality and fair trial as provided by the UN Basic Principles on the Independence of the Judiciary¹. Guarantees for the independence of the judiciary should include provisions for the selection for judicial office of persons of integrity, ability and appropriate qualifications, with guarantees for their security of tenure.

4.3 Safeguards for those deprived of their liberty

¹ Adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders on 5 September 1985 and endorsed by UN General Assembly on 29 November 1985 and on 13 December 1985.

Laws which provide for detention without charge or trial or any other form of arbitrary arrest and detention should be prohibited. In particular all sections of the Preservation of Public Security Regulations providing for indefinite administrative detention without charge or trial should be repealed. All people arrested should be brought before a judicial authority without delay and either charged with a recognizably criminal offence within a reasonable time or released. They should be entitled to challenge the lawfulness of their arrest and detention through a judicial habeas corpus procedure, in accordance with article 9.4 of the ICCPR.

4.4 The prohibition of torture and other cruel, inhuman or degrading treatment or punishment

While legislation alone cannot prevent torture, it is, nevertheless, essential that the laws, including the Constitution as the most fundamental law, should contain the strongest possible safeguards against this serious violation of human rights. The Constitution should include a clear statement that torture or other cruel, inhuman or degrading treatment or punishment will not be tolerated under any circumstances. The prohibition of torture should include the requirement to promptly and impartially investigate complaints of torture, to bring alleged torturers to justice, and to rehabilitate and compensate victims of torture, in accordance with the requirement of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

There should be a prompt and impartial investigation into all reports of attacks and death threats by members of the security forces and deaths of prisoners in custody, with a view to bringing those responsible for unlawful violence to justice. It is important that inquests should be held into all deaths in custody and that their findings should be made public.

Corporal punishment is a cruel, inhuman and degrading form of punishment and as such is prohibited by international law. Laws which provide for corporal punishment, in particular section 25 (3) and 28 of the Penal Code, (permitting up to 24 strokes of a cane or rod), should be repealed and replaced with other penalties which are consistent with recognized international standards for the prevention and punishment of crime and treatment of offenders.

4.5 Protection of the right to life

The right to life is guaranteed by article 3 of the Universal Declaration of Human Rights, article 6 of the ICCPR, and article 4 of the African Charter on Human and Peoples' Rights.

Amnesty International considers the death penalty to be incompatible with full respect for the right to life, as well as the right not to be subjected to cruel, inhuman or degrading punishment. In Amnesty International's view the death penalty is inherently unjust and

arbitrary, however heinous the crime for which it is provided and however scrupulous the procedures by which it is enforced.

Amnesty International therefore urges that the revised Constitution include a positive affirmation guaranteeing the right to life and declaring that the death penalty will never be allowed. Such a step would be consistent with an increasing trend within the international community, and in Africa in particular, towards abolition of the death penalty. Recently, for example, Angola, Namibia, Mozambique, Guinea-Bissau, São Tomé and Príncipe and the Gambia have abolished the death penalty.

As a first step, Amnesty International urges the Malawi government to commute all outstanding death sentences and ensure that all persons charged with the death penalty are given the right to a fair trial in a normal court.

If the revised Constitution does not abolish the death penalty for all crimes, then at the very least, in accordance with article 6 of the ICCPR it should contain a provision that nothing in the Constitution shall be invoked to delay or prevent the abolition of the death penalty in future.

4.6 The police, security and prison services

In the past the police, security service and prison officials have failed to ensure that persons taken into custody are properly treated. A provision binding security and custodial personnel to respect prisoners' rights in accordance with international standards should be included in the Constitution or laws.

These standards include:

- The United Nations (UN) Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly in December 1979 - this code applies human rights principles to the tasks of law enforcement officials;
- the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by consensus on 7 September 1990 by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the UN General Assembly in its Resolution 45/121 of 14 December 1990 - these principles elaborate on Article 3 of the Code of Conduct for Law Enforcement Officials, which requires that such officials use force only when strictly necessary and to the extent required for the performance of their duty;
- the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by UN General Assembly 9 December 1988;
- the UN Standard Minimum Rules for the Treatment of Prisoners adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the UN Economic and Social Council in resolutions of July 1957

and May 1977 - these rules set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of custodial institutions;

- the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions adopted by the UN Economic and Social Council on 24 May 1989 and endorsed by the UN General Assembly by Resolution 44/162 of 15 December 1989.

4.7 Prevention of extrajudicial executions

Under the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, governments are required to ensure that the commission of an extrajudicial execution is a criminal offence, punishable by sanctions commensurate with the gravity of the crime. The prohibition of extrajudicial executions and the essential safeguards for their prevention must not be suspended under any circumstances, including states of war or other public emergency.

The prohibition of extrajudicial executions should be reflected in the training of all officials involved in the arrest and custody of prisoners and all officials authorized to use lethal force, and in the instructions issued to them. These officials should be instructed that they have the right and duty to refuse to obey any order to participate in an extrajudicial execution. An order from a superior officer or a public authority must never be invoked as a justification for taking part in an extrajudicial execution.

All allegations of extrajudicial execution, both those relating to the past and any which are made in future, should be thoroughly, promptly and impartially investigated to establish the circumstances in which killings occurred and assess whether they were unlawful. Those responsible for ordering or carrying out extrajudicial executions should be brought to justice.

4.8 Entrenchment of human rights provisions in the Constitution

Human rights provisions should be entrenched in the Constitution so that no amendment to the Constitution, no subsidiary law and no action by the executive may abridge or abrogate or abolish fundamental constitutional rights, freedoms and guarantees.

4.9 Guarantees for restitution of any constitutional right which may be infringed

The Constitution should clarify the way in which individuals may apply to the courts when their rights and freedoms have been violated. It should also empower the courts to make

any necessary order to ensure protection or restitution of violated rights and freedoms and to award appropriate compensation to victims of human rights violations.

4.10 Ombudsman's office

Some constitutions provide for the establishment of an Ombudsman who is independent of the government and whose method of appointment, powers and functions are outlined in the Constitution. An independent body to monitor human rights and to help to prevent human rights violations could usefully be included in the Malawi Constitution.

It is often the case that those who are most vulnerable to violations of their constitutional rights may not know how to seek redress. The duties of an Ombudsman would include investigating alleged or apparent instances of violation of fundamental rights and freedoms, abuse of power, unlawful, oppressive or unfair treatment of citizens by government officials and other complaints as may be defined by law, and assisting victims of such violations, abuse or unfair treatment to obtain redress.

4.11 Ratification of international and regional human rights treaties and their incorporation into Malawian law

Malawi ratified the African Charter on Human and Peoples' Rights in 1990 but as yet has not incorporated its provisions into national law or practice. Amnesty International recommends that steps be taken to do so and to ratify key international human rights instruments as soon as possible. In particular, Malawi should ratify the International Covenant on Civil and Political Rights (with its two Optional Protocols); the International Covenant on Economic, Social and Cultural Rights; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Constitution should provide for international human rights treaties to which Malawi is, or becomes, a party to be fully incorporated into national law.

5) AMNESTY INTERNATIONAL'S APPEALS TO MALAWIANS AND ALL THOSE INVOLVED IN THE DEBATE ON THE CONSTITUTION

Amnesty International appeals to all who may be involved in recommending changes to the Constitution and laws to strive for the highest possible standards of human rights protection. Those involved include not only members of the government, but also legislators, opposition groups, members of the legal profession, religious groups, non-governmental organizations and ordinary citizens. The media also has the vital role of ensuring that Malawians are made aware of the issues and can contribute to the debate.

Amnesty International also urges governments giving aid to Malawi, the UN and any other inter-governmental organizations or human rights organizations, to support the

introduction into Malawi's Constitution and laws of the strongest possible guarantees to protect the human rights of present and future generations of Malawians.